IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAWN SUTTON	:	CIVIL ACTION
	:	
v.	:	
	:	
FRANK D. GILLIS, et al.	:	No. 04-147

MEMORANDUM

Padova, J. **July , 2004**

Before the Court is Shawn Sutton's *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons that follow, the Court denies the Petition in its entirety.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 10, 1997, before the Honorable Paula Francisco Ott of the Court of Common Pleas for Chester County, Petitioner pled guilty to two counts of robbery, two counts of aggravated assault, two counts of terroristic threats and eight other related offenses. The conviction resulted from Petitioner's robbery of an elderly couple who operated a local grocery store. On May 23, 1997, the trial court sentenced Petitioner to an aggregate term of 20 to 50 years imprisonment. On October 1, 1997, after conducting a hearing on Petitioner's motion for reconsideration of sentence, the trial court reduced Petitioner's sentence to 18 to 40 years imprisonment. Petitioner thereafter filed an appeal with the Pennsylvania Superior Court challenging the modified sentence. On March 5, 1998, upon consideration of a joint motion filed by the Commonwealth of Pennsylvania ("Commonwealth") and Petitioner, the

Pennsylvania Superior Court ("Superior Court") vacated Petitioner's judgment of sentence and remanded the case for resentencing because there was no stenographic record of the reconsideration of sentence hearing. After conducting sentencing hearings on June 8, 1998 and July 8, 1998, the trial court resentenced Petitioner to an aggregate term of 18 to 36 years imprisonment. Petitioner thereafter filed a post-sentence motion to withdraw his guilty plea and a motion for reconsideration of sentence, both of which were denied after evidentiary hearings on August 27, 1998 and September 8, 1998. On appeal to the Superior Court, Petitioner argued that the trial court committed several errors in calculating his sentence and further erred in denying his post-sentence motion to withdraw his guilty plea. The Superior Court held that Judge Ott erred in calculating Petitioner's sentence and remanded the case for resentencing. Commonwealth v. Shawn Sutton, No. 3283 Phila. 1998, J.A17936/99 (July 12, 1999). However, the Superior Court rejected Petitioner's remaining contentions. Id. On November 17, 1999, Judge Ott resentenced Petitioner to an aggregate term of 15 to 30 years imprisonment. Petitioner appealed the judgment of sentence and raised the following three issues:

> [1.] Whether the trial court violated the fundamental norms of sentencing when it sentenced appellant to an aggregate term of imprisonment of fifteen (15) years to thirty (30) years, a sentence unreasonable and excessive.
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> [2.] Whether the trial court abused its discretion in sentencing appellant outside the applicable guidelines as determined by the Sentencing

Commission.

[3.] Whether the trial court erred in failing to address count one, robbery, at the time of resentencing, likewise failing to demonstrate consideration of the guidelines with respect to count one of the record.

Commonwealth v. Sutton, No. 373 EDA 2000, slip op. at 3 (Pa. Super. Ct. Sept. 11, 2000). The Superior Court affirmed the judgment of sentence on September 11, 2000. Commonwealth v. Sutton, 766 A.2d 892 (Pa. Super. Ct. 2000)(table). Petitioner did not seek direct review in the Pennsylvania Supreme Court.[1]

On September 5, 2001, Petitioner timely filed a *pro se* petition pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. § 9541. The PCRA court appointed counsel for Petitioner. After reviewing the record, counsel filed a "no merit" letter pursuant to Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. Ct. 1988), seeking permission to withdraw as counsel. The PCRA court granted counsel permission to withdraw and informed Petitioner of its intention to dismiss the petition pursuant to Pennsylvania Rule of Criminal Procedure 907. On February 26, 2002, the PCRA court dismissed Petitioner's petition without a hearing.

[1] On May 9, 2000, the Pennsylvania Supreme Court issued Order No. 218, which declared that litigants "shall not be required to petition for hearing or allowance of appeal following an adverse decision by the Superior Court in order to be deemed to have exhausted all available state remedies respecting a claim of error." In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000).

Petitioner appealed to the Superior Court and raised the following three issues:

> [1.] Whether trial counsel was ineffective for failing to object to the constitutionally impermissible plea colloquy which failed to inform the defendant of his right to trial by jury & counsel was ineffective for failing to withdraw the unknowing and involuntary plea; all prior counsel was [sic] ineffective for failing to raise & preserve this claim for relief?
>
> [2.] Whether trial counsel was ineffective for failing to object to the constitutionally impermissible plea colloquy which failed to inform the defendant that he was presumed innocent until found guilty & counsel was ineffective for failing to withdraw the unknowing and involuntary plea; all prior counsel was [sic] ineffective for failing to raise & preserve this claim for relief?
>
> [3.] Whether trial counsel was ineffective for failing to challenge the defective plea colloquy insofar as there was no factual basis established on the record for the sentence imposed & counsel was ineffective for failing to object to the subsequent unknowing and unintelligent plea; all prior counsel was [sic] ineffective for failing to raise & preserve this claim for relief?

Commonwealth v. Sutton, No. 987 EDA 2002, slip. op. at 5-6 (Pa. Super. Ct. July 18, 2003). On July 18, 2003, the Superior Court affirmed the decision of the PCRA court in an unpublished opinion. Commonwealth v. Sutton, 835 A.2d 837 (Pa. Super. Ct. 2003). On December 23, 2003, the Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal.

On January 6, 2004, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. He raises thirteen grounds for relief, which are summarized as follows:

(A) The trial court erred in sentencing Petitioner to an

unreasonable and excessive term of imprisonment under the applicable sentencing guidelines;

(B) The trial court erred in sentencing Petitioner outside the applicable sentencing guidelines;

(C) The trial court erred in sentencing Petitioner, without any explanation, outside the sentencing guidelines applicable to count one (robbery);

(D) Trial counsel was ineffective for failing to object to the trial court's guilty plea colloquy on the ground that Petitioner was not advised of his right to a jury trial and for failing to move to withdraw Petitioner's involuntary guilty plea;

(E) Trial counsel was ineffective for failing to object to the trial court's guilty plea colloquy on the ground that Petitioner was not advised of the presumption of innocence standard and for failing to move to withdraw Petitioner's involuntary guilty plea;

(F) Trial counsel was ineffective for failing to challenge the trial court's guilty plea colloquy insofar as there was no factual basis established on the record for the sentence imposed, and for failing to move to withdraw Petitioner's involuntary guilty plea;

(G) Trial counsel was ineffective in advising Petitioner that the issues raised by his suppression motion would be preserved for appeal even though he had entered a guilty plea;

(H) The trial court erred in failing to advise Petitioner of his right to withdraw or otherwise challenge the validity of his guilty plea within ten days of entry of the plea;

(I) The trial court erred in advising Petitioner that the court "would give a strong indication of leniency" at his sentencing hearing based on his decision to plead guilty;

(J) Trial counsel was ineffective in advising Petitioner that he was required to answer in the affirmative all of the questions asked by the trial court during the guilty plea colloquy;

(K) The trial court erred in sentencing Petitioner based

on the sentences imposed upon defendants in unrelated cases;

(L) The trial court erred in accepting Petitioner's guilty plea as knowing and voluntary given that the court was aware that he intended to appeal the court's ruling on his suppression issues; and

(M) The prosecutor committed misconduct by advising Petitioner that he could file a post-sentence motion pertaining to the suppression issues and for leading Petitioner to believe that his suppression motion did not pertain to any evidence that the prosecutor intended to present at trial.

The Court referred this case to Magistrate Judge Thomas J. Reuter for a Report and Recommendation pursuant to 28 U.S.C. § 636. On March 4, 2004, the Magistrate Judge filed a Report and Recommendation recommending that the Petition for Writ of Habeas Corpus be denied in all respects, without an evidentiary hearing. After receiving an extension of time, Petitioner timely filed objections to the Report and Recommendation on May 10, 2004. In his objections, Petitioner advised the Court that he had not yet received Respondents' Answer to his Petition for Writ of Habeas Corpus. The Court thereafter ordered the Clerk to send Petitioner a copy of the Respondents' Answer and provided Petitioner with additional time in which to file supplemental objections to the Magistrate Judge's Report and Recommendation. As the deadline for filing supplemental objections has now passed without any further response from Petitioner, the Court will proceed to review his objections as set forth in the May 10, 2004 filing.

II. LEGAL STANDARD

Where a habeas petition has been referred to a magistrate judge for a Report and Recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made . . . [The Court] may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b) (1994).

III. DISCUSSION

A. Claims Not Cognizable on Federal Habeas Review

Petitioner's claims A, B and C challenge the validity of the sentence imposed upon him by the trial court under the Pennsylvania Sentencing Guidelines. Petitioner never challenged his sentence on federal constitutional grounds in the state courts, and the Pennsylvania Supreme Court rejected claims A, B, and C as a matter of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Jones v. Sup't of Rahway State Prison, 725 F.2d 40, 43 (3d Cir. 1984)(holding that errors of state law in sentencing are not cognizable in federal habeas proceedings). As Claims A, B, C are not cognizable on federal habeas review, the Court must deny habeas relief with respect to these claims.

B. Procedural Default

In order to exhaust the available state court remedies on a claim, a petitioner must fairly present all the claims that he will make in his habeas corpus petition in front of the highest available state court, including courts sitting in discretionary appeal. O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999). To "fairly present" a claim, a petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999). Thus, "[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts, and the same method of legal analysis must be available to the state court as will be employed in the federal court." Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1231 (3d Cir. 1992). The burden of establishing that a habeas claim was fairly presented in state court falls upon the petitioner. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000). "[I]f [a] petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred . . . there is procedural default for the purpose of federal habeas . . . ." Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Procedural default bars federal review of those claims precluded by state law. Coleman, 501 U.S. at 729.

In his Petition, Petitioner concedes that he has not previously raised claims G, H, I, J, K, L, and M in the state courts.[2] Petitioner further admits that he cannot return to the state courts to file a successive PCRA petition on his unexhausted claims because the one-year statute of limitations for such petitions has expired.[3] See 42 Pa. Cons. Stat. § 9545(b)(1).[4]

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[2] The Court notes that Petitioner did list claim G, which asserts that trial counsel was ineffective in advising Petitioner that the issues raised by his unsuccessful suppression motion would be preserved for appeal even though he had entered a guilty plea, in his "Concise Statement of Matters Complained Of," filed pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), on his second direct appeal in the state courts. Assuming *arguendo* that Petitioner properly preserved this claim for federal review, the Court would still decline to grant habeas relief in this respect. Petitioner does not allege in his habeas petition that, had counsel correctly informed him that entry of a guilty plea would preclude him from appealing the trial court's denial of his suppression motion, he would have pleaded not guilty and insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 60 (1985). He has alleged no special circumstances that might support the conclusion that he placed particular emphasis on the preservation of the issues raised in his suppression motion in deciding whether or not to plead guilty. The Court further notes that the record in this case is replete with evidence of Petitioner's guilt, such that he would have likely pleaded guilty, or have been found guilty after trial, even if his trial counsel had advised him that pleading guilty would result in waiver of his appeal of the suppression issues. See United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989). As Petitioner was not prejudiced by trial counsel's failure to advise him of the waiver, his ineffectiveness claim must fail. See Strickland v. Washington, 466 U.S. 674, 687-96 (1984).

[3] Despite his concession that claims G, H, I, J, K, L, and M are procedurally barred in the state courts, Petitioner argues that the Court should stay his exhausted claims until he exhausts his remaining claims in the state courts, at which point the Court may consider the merits of all the claims set forth in his Petition. The United States Court of Appeals for the Third Circuit has authorized habeas courts to employ such a procedure in situations where the court is confronted with a mixed petition, i.e., a

Moreover, Petitioner has not alleged, nor would the state court likely find, that any of the three exceptions to the PCRA statute of limitations apply in this instance. Id. Accordingly, Petitioner has procedurally defaulted claims G, H, I, J, K, L, and M.

Where a state prisoner has procedurally defaulted his federal claims in state court, federal habeas review of the claims is barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrate that failure to consider the claims will result in

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petition that contains both exhausted and unexhausted claims. Crews v. Horn, 360 F.3d 146, 154 (3d Cir. 2004). However, if the unexhausted claims are procedurally barred in the state courts, the petition is not a mixed petition. Toulson v. Beyer, 987 F.3d 984, 987 (3d Cir. 1993). In such an instance, "[t]he district court may not go to the merits of the barred claims, but must decide the merits of the claims that are exhausted and not barred." Id. (citation omitted).

[4] Section 9545(b)(1) provides, in pertinent part:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and petitioner proves that:
>
> (i) the failure to raise such a claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa. Cons. Stat. § 9545(b)(1).

a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. The Magistrate Judge concluded that Petitioner failed to demonstrate cause and actual prejudice or a fundamental miscarriage of justice because of actual innocence. Petitioner objects to the Magistrate Judge's findings, arguing that he has established both bases for excusing procedural default.

A demonstration of cause sufficient to survive dismissal "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." Caswell v. Ryan, 953 F.2d 853, 862 (3d Cir. 1992). Petitioner appears to assert that the procedural default of his claims resulted from PCRA counsel's failure to amend the PCRA petition, as Petitioner requested, to include claims G, H, I, J, K, L, and M. Counsel's ineffectiveness in failing to properly preserve a claim for state-court review will suffice as cause, but only if that ineffectiveness itself constitutes an independent constitutional claim. Edwards v. Carpenter, 529 U.S. 446, 451 (2000). Ineffective assistance of PCRA counsel does not, however, constitute an independent constitutional claim because Petitioner had no Sixth Amendment right to counsel on his PCRA appeal. Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002). Petitioner has failed, therefore, to sufficiently demonstrate cause for the procedural default of claims

G, H, I, J, K, L, and M.[5]

To excuse procedural default on the basis of a fundamental miscarriage of justice, a habeas petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). To establish the requisite probability, the petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have convicted him. Schlup v. Delo, 513 U.S. 298, 329 (1995). Petitioner must "support his allegation of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence - that was not presented at trial." Id. at 324. Petitioner does not offer any new evidence, much less reliable new evidence, in support of his actual innocence claim. The Court concludes, therefore, that Petitioner has failed to demonstrate a fundamental miscarriage of justice sufficient to overcome the procedural default of claims G, H, I, J, K, L, and M. Accordingly, the Court is precluded from considering the merits of these claims.

C. Petitioner's Remaining Claims

The Court has considered the merits of Petitioner's remaining

[5] Because the Court concludes that Petitioner has failed to establish cause, it need not address the issue of whether Petitioner has established prejudice.

claims. The instant Petition was filed pursuant to 28 U.S.C. § 2254, which allows federal courts to grant habeas corpus relief to prisoners "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Since it was filed after April 24, 1996, the Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), P.L. 104-132, 110 Stat. 1214. See Lindh v. Murphy, 521 U.S. 320, 326-27 (1997). Section 2254(d)(1), as amended by AEDPA, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d)(1).

Under the AEDPA, a state court's legal determinations may only be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. § 2254(d)(1). This phrase refers to the "holdings, as opposed to the dicta" of the United States Supreme Court's decisions as of the

time of the relevant state court decision. Williams v. Taylor, 529 U.S. 362, 412 (2000). Courts look to principles outlined in Teague v. Lane, 489 U.S. 288 (1989), to determine whether a rule of law is clearly established for habeas purposes. Williams, 529 U.S. at 379-80, 412. "[W]hatever would qualify as an old rule under [the Court's] Teague jurisprudence will constitute clearly established Federal law," except that the source of that clearly established law is restricted to the United States Supreme Court. Id. at 412.

To apply the AEDPA standards to pure questions of law or mixed questions of law and fact, federal habeas courts initially must determine whether the state court decision regarding each claim was contrary to clearly established Supreme Court precedent. Werts v. Vaughn, 228 F.3d 178, 197 (3d Cir. 2000). A state court decision may be contrary to clearly established federal law as determined by the United States Supreme Court in two ways. Williams, 529 U.S. at 405. First, a state court decision is contrary to Supreme Court precedent where the court applies a rule that contradicts the governing law set forth in United States Supreme Court cases. Id. Alternatively, a state court decision is contrary to Supreme Court precedent where the state court confronts a case with facts that are materially indistinguishable from a relevant United States Supreme Court precedent and arrives at an opposite result. Id. at 406. If relevant United States Supreme Court precedent requires an outcome contrary to that reached by the state court, then the court may grant habeas relief at this juncture. Matteo v. Superintendent

S.C.I. Albion, 171 F.3d 877, 890 (3d Cir. 1999).

If the state court decision is not contrary to precedent, the court must evaluate whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. A state court decision can involve an "unreasonable application" of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of the particular state prisoner's case. Williams, 529 U.S. at 407. A state court determination also may be set aside under this standard if the court unreasonably refuses to extend the governing legal principle to a context in which the principle should control or unreasonably extends the principle to a new context where it should not apply. Ramdass v. Angelone, 530 U.S. 156, 166 (2000); Williams, 529 U.S. at 407.

To grant a habeas corpus writ under the unreasonable application prong, the federal court must determine that the state court's application of clearly established federal law was objectively unreasonable. Williams, 529 U.S. at 409; Werts, 228 F.3d at 197. A federal court cannot grant habeas corpus simply by concluding in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly; mere disagreement with a state court's conclusions is insufficient to justify relief. Williams, 529 U.S. at 411; Matteo, 171 F.3d at 891. In determining whether the state court's application of the Supreme Court precedent is objectively unreasonable, habeas courts

may consider the decisions of inferior federal courts. Matteo, 171 F.3d at 890.

Section 2254 further mandates heightened deference to state court factual determinations by imposing a presumption of correctness. 28 U.S.C.A. § 2254(e)(1). The presumption of correctness is rebuttable only through clear and convincing evidence. Id. Clear and convincing evidence is evidence that is "so clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985).

The district court may only grant relief on a habeas claim involving state court factual findings where the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C.A. § 2254 (d)(2); see Weaver v. Bowersox, 241 F.3d 1024, 1030 (8th Cir. 2001); Watson v. Artuz, No. 99Civ.1364(SAS), 1999 WL 1075973, at *3 (S.D.N.Y. Nov. 30, 1999) (listing cases). The district court must conclude that the state court's determination of the facts was objectively unreasonable in light of the evidence available to the state court. Weaver, 241 F.3d at 1030 (citing Williams, 529 U.S. at 409); Torres v. Prunty, 223 F.3d 1103, 1107-08 (9th Cir. 2000); see also Watson, 1999 WL 1075973, at *3. Mere disagreement with the state court's determination, or even erroneous factfinding, is insufficient to grant relief if the court

acted reasonably. Weaver, 241 F.3d at 1030.

Although alleged separately, claims D, E, and F in the Petition set forth the single issue of whether trial counsel was ineffective for failing to challenge the voluntariness of Petitoner's guilty plea. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance, id. at 687, and set forth a two-prong test for determining ineffective assistance of counsel. A defendant first must show that counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. "In evaluating counsel's performance, [the Court is] 'highly deferential' and 'indulge[s] a strong presumption' that, under the circumstances, counsel's challenged actions 'might be considered sound . . . strategy,'" Buehl v. Vaughn, 166 F.3d 163, 169 (3d Cir. 1999)(quoting Strickland, 466 U.S. at 689). "Because counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing, [] it is 'only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance.'" Id. (citing United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

If a defendant shows that counsel's performance was deficient, he then must show that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results is reliable." Id. Defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In rejecting claims D, E, and F on collateral review, the Pennsylvania Superior Court noted that Petitioner had signed a written guilty plea colloquy that "fully informed [him] of all of the rights he was surrendering, including his right to a jury or bench trial, and the presumption of innocence." Commonwealth v. Sutton, No. 987 EDA 2002, slip op. at 9 (Pa. Super. Ct. July 18, 2003). The court also found that the prosecutor had provided a sufficient factual basis for the plea, based on the following excerpt from the guilty plea hearing:

> THE COURT: . . . Let's hear the facts of the case, please.
>
> MR. PINE: On August 20, [1996], at approximately 12:40 PM, at 141 High Street, Phoenixville, defendant, age 22, entered Rogalas' Grocery Store and repeatedly assaulted Annie Rogala, age 69, with his fists and feet and demanded money. Defendant took money and food stamps from the cash register. While Annie Rogala tried to get up, defendant punched and kicked her again.
>
> When Joe Rogala came into the store, age 73, the

> defendant repeatedly assaulted him by punching him. Annie Rogala retreated into the house, and he ordered her to get more money to give to the defendant in order for the defendant to stop the assault on Joe Rogala.
>
> Both victims had serious bodily injury and required extensive follow-up treatment.
>
> When the defendant finally left, he threatened to shoot them and burn them out if they called the police.

Id. at 9-10(quoting 4/10/97 N.T. at 3).

This ruling by the Pennsylvania Superior Court is neither contrary to, nor an unreasonable application of, federal law. In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that a guilty plea be entered intelligently and voluntarily. Id. at 242-43. Before pleading guilty, a criminal defendant should be advised of "all of his constitutional rights and protections, including the privilege against compulsory self-incrimination, guaranteed by the Fifth Amendment, the right to trial by jury, and the right to confront one's accusers." Hill v. Beyer, 62 F.3d 474, 480 (3d Cir. 1995)(citing Boykin, 295 U.S. at 243). "The failure to specifically articulate Boykin rights, however, is not dispositive if the circumstances otherwise establish that the plea was constitutionally acceptable." Id. at 481.

In this case, Petitioner executed an extensive written guilty plea colloquy that fully advised him of his constitutional rights,

including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront his accusers. Furthermore, Petitioner acknowledged in open court that he had reviewed the guilty plea colloquy form with his attorney, that his attorney had answered all of his questions concerning the form, and that he had personally signed or initialed the form on each page. (4/10/97 N.T. at 8-9); see Blackledge v. Allison, 431 U.S. 63, 74 (1977)(noting that a defendant's "declarations in open court carry a strong presumption of verity"). Moreover, although due process does not require an on-the-record development of the factual basis supporting a guilty plea, Meyers v. Gillis, 93 F.3d 1147, 1148 (3d Cir. 1996), the record fairly supports the Pennsylvania Superior Court's finding that the factual basis was established before entry of Petitioner's guilty plea. As the circumstances of Petitioner's guilty plea establish that his plea was constitutionally acceptable, any objections raised by trial counsel would have been meritless. It is well-settled that "there can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). Accordingly, the Court declines to grant habeas relief with respect to claims D, E, and F.

IV. CONCLUSION

Following a *de novo* review of the Petition and the Magistrate Judge's Report and Recommendation, the Court overrules all of

Petitioner's objections, adopts the Magistrate Judge's Report and Recommendation, and denies the Petition. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAWN SUTTON	:	CIVIL ACTION
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v.	:	
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FRANK D. GILLIS, et al.	:	No. 04-147

O R D E R

AND NOW, this day of July, 2004, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. No. 1) and all attendant and responsive briefing, and after review of the Report and Recommendation of the United States Magistrate Judge Thomas J. Reuter, and in consideration of Petitioner's Objections to the Magistrate Judge's Report and Recommendation, and the Record before the Court, **IT IS HEREBY ORDERED** that:

1. Petitioner's Objections to the Report and Recommendation are **OVERRULED;**
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is **DENIED;**
4. As Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2); and
5. The Clerk shall **CLOSE** this case statistically.

BY THE COURT:

_____

John R. Padova, J.